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No. 99-

IN THE

Supreme Court of the United States

LODD ENTERPRISES, INC. and DELMONT O. DAPREMONT, JR.,

Petitioners,

v.

COASTAL FORD, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the standard for granting a Motion for Summary Judgment was consistent with the previous decisions of the Supreme Court and the Eleventh Circuit Court of Appeals.

LIST OF PARTIES

The respondents not named in the caption are: Ford Motor Company, Ford Motor Credit Corporation, Oscar Carter, Thomas Dorsey, Mike Ermiger, Don Harmon and Mike Ratchford.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Lodd Enterprises, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioners, Lodd Enterprises, Inc. ("Lodd") and Delmont O. Dapremont, Jr. ("Dapremont"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit was published without opinion at *Coastal Ford v. Lodd Enterprises*, 202 F.3d 288 (11th Cir. 1999). (App. A) The opinion of the district court in *Coastal Ford, Inc. v. Lodd Enterprises*, Civil No. 97-0640-BH-C, is not published but can be found at 1999 U.S. Dist. LEXIS 1983. (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on November 15, 1999. The Court of Appeals denied a timely petition for rehearing on January 3, 2000. (App. C).

The jurisdiction of the lower court and this Court is invoked under 28 U.S.C § 1254(1).

RULE INVOLVED

Fed. R. Civ. P. 56(c) provides:

> (c) The motion shall be served at least 10 days before the time fixed for a hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a

judgment as a matter of law. A summary judgment interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

The fundamental question in this case is whether the lower court applied the correct standard in reviewing the facts of this case in order to rule on a Motion for Summary Judgment. Due to the complex nature of this case, a thorough understanding of the facts leading up to the termination of the agreement between Dapremont, Lodd and Ford is essential to this petition.

A. Ford's Dealer Development Plan

In 1950, Ford Motor Company ("Ford") developed the "Dealer Development Plan". The mission of the Dealer Development Plan is to "maintain the strength of the present Ford Motor Company dealer organization, and to build for future improvement by providing partial capitalization for qualified prospective dealer applicants who lack only adequate capital." (Ford and Lincoln-Mercury Dealer Development Program Orientation: "*A Move Worth Considering*"). The terms of the plan provided for: (1) Ford to make an initial investment in Preferred Stock of 60 percent of the total capital; (2) Ford to fund a long-term promissory note for 30 percent of the total capitalization; and (3) the operator to make an investment in common stock equal to 10 percent of the total capitalization. In order for the operator's equity to increase, the plan allotted for the dealership's yearly profits to be applied towards the redemption of preferred stock.

Under the plan, Ford represented to prospective operators the "operators can be assured of a strong working relationship with Dealer Development, the Dealership Corporation's

Board of Directors and Executive Committee, as well as with the facing Ford or Lincoln-Mercury Regional Marketing and Sales Office, Ford Motor Credit Company Branch Office, and Ford Customer Service Division Regional Office." *Id.* at 9.

In April of 1981, Ford began its Minority Dealer Operations Department in an effort to reaffirm its commitment to retail automotive opportunities for minorities. With this commitment, Ford established six guidelines that were the minimum efforts required to ensure that the Ford achieved a successful minority dealer program and included seeking out qualified black applicants to establish Ford dealerships, providing special counseling and assistance to minority dealers to improve their operating performance, especially during depressed economic periods and making exceptional efforts to assist minority dealers to achieve and maintain adequate working capital levels.

A little over a year later, because of an apparent lack of support from Ford employees, Ford again reaffirmed its commitment to helping black dealers succeed. In doing so, it established four additional guidelines to increase the number of black Ford and Lincoln-Mercury dealers nationwide. These new guidelines included a challenge to each Ford District Manager to appoint one black dealer by the middle of the following year.

B. Lodd's Involvement With Ford

In the early 1980's, Mr. James Smith, from Ford's New Orleans District, approached Dapremont, a minority, regarding the possibility of Dapremont investing in a car dealership. Because Dapremont did not have all of the money necessary to invest, he approached three of his friends, Oscar Carter, Don Carter and Leonard Weathers. The three of them placed $300,000.00 in escrow and researched the possible investment in Coastal Ford, Inc. ("Coastal") in Mobile,

Alabama. The three were aware of Coastal's financial difficulties, but believed with the help that Ford was offering them they could make money for the dealership.

Dapremont moved from Louisiana to Mobile in September of 1983. Initially, Coastal was wholly owned by Ford for a 90-day period. Because of unexpected costs from prior periods, including theft committed by a former general manager, Dapremont and his partners requested another 90-day wholly owned period and an additional capital investment by Ford. Once Ford agreed to the second 90-day wholly owned period, Dr. Don Carter and Dr. Weathers withdrew their funds from the escrow. Dapremont and Mr. Oscar Carter ("Carter") continued on with an initial investment of $150,000.00.

Dapremont and Carter formed Lodd Enterprises, Inc. ("Lodd") to be the operator of Coastal. After Lodd invested $150,000.00 in Coastal, Lodd became the minority operator of Coastal and Dapremont was appointed president in March of 1984. After the six month wholly owned period, Coastal was profitable under Dapremont's management from 1984 to 1988. As a result of Coastal's profitability, Lodd's ownership in Coastal increased each year. By 1988, Lodd owned 64.1% of the outstanding stock in Coastal and had invested 62.3% of the capital, increasing from 37% and 24% in 1984.

Due to Lodd's success with Coastal, Dapremont requested approval from Ford for an early buy out of Coastal by Lodd on October 13, 1988. On November 4, 1988, Mr. Thomas Dorsey of Ford wrote a letter to Dapremont stating "Based on your profit performance in 1988 and in anticipation of equal or better profit performance in 1989, there exists a possibility for you to accomplish a buyout of Dealer Development in 1989." However, behind the scenes Mr. Dorsey was doing everything in his power to thwart the early buy out plan. On March 6, 1988, Mr. Dorsey sent an

interoffice memo to Mr. R.W. Sullivan expressing numerous reasons why he did not support the early buy out of Coastal by Lodd, including the fact that he believed a recession in the economy was on the rise.

In 1989, the United States hit an economic recession. As a result of the recession, both Ford and Coastal began to suffer losses. Specifically, Ford's income for the year began to decrease in 1989, reaching an all time low in 1992. Ford lost $2.258 billion in 1991 and $7.385 billion in 1992. After 1992, Ford's income began to improve. In much the same way, Coastal's progress began to drop in 1989. Coastal's hardest year, however, was in 1993, rather than 1992. Coastal lost $141,200.00 in 1992 and $763,600.00 in 1993. After 1993, Coastal's income began to improve, and the company was on an upward trend when Ford decided to terminate Lodd.

C. Ford's Infusion Of More Capital In Coastal

Ford provided more capital to Coastal on four occasions. First, when Ford moved Coastal in 1986 to Airport Boulevard, the move required an infusion of additional capital to: purchase new equipment needed for the new facility; support an additional volume of used car inventory; fund proven and projected parts sales; and provide required cash needed as a result of an increase in sales. In June of 1986, therefore, Ford provided $400,000.00 in additional capital. Ford divide the investment equally between an increase in its Preferred Stock and the issuance of a long-term note. At this time, Lodd's ownership in Coastal decreased from 38% to 26%.

Then, in late December 1989, additional cash and working capital were needed due to higher sales of used vehicles and a year to date loss for 1989. Ford provided an additional investment of $600,000.00 in January 1990. Ford once again divided the investment equally between an increase in its preferred stock and the issuance of a long term

note. At this time, Lodd's ownership decreased from 64% to 44%.

In early 1992, Dapremont expressed a need for additional capital in the amount of $950,000.00 to Mark Ratchford of Ford. Mr. Ratchford never supported Dapremont's request and argued that if Ford were to provide additional monies to Coastal, it should only provide $600,000.00 and argued for extreme limitations for the six months after the capitalization. Despite the need for $950,000.00, Ford provided $700,000.00 in capital. Ford once again divided the investment equally between an increase in its preferred stock and the issuance of a long-term note. At this time, Lodd's ownership decreased from 43.9% to 32.1%.

In April of 1993, Ford and Lodd reached an agreement for "capital restructuring". The agreement provided that Ford would make a cash contribution of $1,139,611.00 and that Lodd would not receive any bonus or profit distribution until its operator's impairment was restored to par value by profits. The money was paid to Coastal on August 16, 1993. Lodd was informed that future losses may result in Ford's recommendation to terminate the management agreement. Under the agreement, Ford also agreed to cover any expenses prior to March 1, 1993. At the time of the agreement, Ford wrote off $409,000.00 for various expenses that occurred before March 1, 1993.

In early 1994, however, the dealership incurred losses of $217,000.00 as a result of legal bills and judgments which occurred before March 1, 1993. The lawsuit related losses were not included in the $409,000.00 written off at the time of the restructure agreement. Because the dealership suffered the losses in 1994, the dealership had to use the $409,000.00 to cover lawsuit losses even though the money had been allocated for other expenses which occurred before March 1, 1993. Dapremont made repeated requests for Ford to reimburse the dealership for the lawsuit related losses. Even

though obligated under the restructure agreement to reimburse the dealership for such losses, Ford did not immediately reimburse the dealership for the lawsuit expense. Instead, the dealership was without the necessary $217,000.00 for close to a year. Because the dealership did not have the money promised under the 1993 restructure agreement, Lodd could not meet Ford's requirements. Finally, in January of 1995, Ford provided Coastal with the necessary $217,000.00.

D. Ford's "Line In The Sand" And Dorsey's Efforts To Push Lodd Over The Line

In early 1995, Lodd exceeded the established loss limit under the 1993 restructure agreement. In spite of this, because of progress shown through August 1995, Ford deferred action on termination and informed Dapremont if progress was not sustained, or cash was depleted, it would recommend termination of his management agreement.

In October, 1996, Mr. Olan Hicks came to Coastal to perform the usual Ford audit. Mr. Hicks realized that a large majority of the $140,000.00 in adjustments that he found were Ford warranty receivables and Ford program receivables. Dapremont explained to Hicks that a number of receivables were a result of the dealership placing the wrong program number on an invoice and sending them into Ford; Ford would then kick the invoice back and Coastal would correct the program number. Dapremont also informed Hicks that, because the majority of adjustments were receivables, Dapremont could no collect most of the amount. Hicks gave Dapremont two weeks to collect the receivables and suspended his audit for that time.

However, before the two weeks expired, Dapremont received a phone call from Ford in Detroit, Michigan informing him that Lodd's Management Agreement was being terminated because of the $140,000.00 in adjustments.

Mr. Dorsey falsely informed Detroit about the $140,000.00, claiming the money was a loss, rather than receivables that were being collected. Once Dapremont demonstrated to Ford the true situation regarding the adjustments, Ford stopped its termination efforts.

Dapremont was informed a second time that Ford was going to terminate Lodd after the March 3, 1997 Ford Lincoln-Mercury Minority Dealer Association Meeting. Dapremont was informed that Mr. Dorsey sent a report to Detroit claiming that Coastal could not pay its bills, that Coastal's bills were behind two months, and that Coastal's checks were bouncing all over town. Dapremont compiled a number of documents, including Dealer Development audit reports from 1996, which indicated that the reserves were fine. At that time, Dapremont was told that Mr. Rewey, Vice President of Operations for Ford, had said "as long as [Dapremont] did not run out of money, [he] was all right."

E. Examples Of Dorsey, Ermiger, Harmon And Ratchford's Opposition To Lodd And Dapremont

In 1988 or 1989, Dapremont purchased two pieces of property, one across the street from and one to the west of Coastal. Dapremont allowed Coastal to use the property across the street as a body shop, while he allowed the other piece of property to be used as a parking lot for Coastal employees. After Dapremont purchased the property directly to the west of Coastal, he personally worked from 6 a.m. to 6 p.m. clearing and leveling the land to make it suitable for use. He used a 1950 dozer that he had personally purchased for use at his hunting camp, a tractor that Coastal used to haul inoperable cars, a dump truck that Coastal used to haul trash and chainsaws that he had purchased through Coastal. After the land had been cleared, he brought in dirt to level the property. Because Dapremont cleared and leveled the land himself, he saved Coastal approximately $20,000.00 and did not charge Ford anything for his services.

Dapremont did charge Coastal rent for the use of the property. Mr. Dorsey approved Coastal's rental of the property as long as the rent was exactly the same price as Dapremont's note on the property. Because Dapremont desperately needed more space for Coastal's production, he agreed to Mr. Dorsey's restrictions. These restrictions became extremely costly for Dapremont, however, because the only depreciable item on the properties was a small body shop building. Dapremont requested on numerous occasions that Mr. Dorsey permit him to charge a little more than the note price in order to cover the tax costs. Although Mr. Dorsey authorized a higher rent than the note price for a number of other dealers he supervised, he refused to permit Dapremont to charge a slightly higher rent. Because of Dorsey's refusal, Dapremont eventually had to sell his property at a tremendous loss.

In 1994, Dapremont began experiencing problems obtaining "hot" merchandise from the Orlando district office. Specifically, Mark Ratchford, Ford's Regional Sales Manager, had total control over the allocation of the number and types of vehicles comprising Coastal's inventory and was placing extreme conditions, which would have placed Dapremont deeper in the hole, on Dapremont's ability to obtain merchandise. In response to Ratchford's oppressive actions, Dapremont began reducing the new car inventory and increasing the used car inventory over which Ratchford had no control. In order to build the used car inventory, Coastal had a great deal of its cash money in the used car inventory.

At the same time Dapremont began purchasing used cars to increase the used car inventory, Ford Credit began increasing its floor plan audits of Coastal. In a floor plan audit, Ford Credit came to Coastal and audited every new and used car it had "floor planned" (*i.e.*, financed). If a car that Ford Credit had floor planned was not on the lot at the

time of the audit, Ford Credit would demand payment for the car within three days from the date the car was sold. Every time Ford Credit conducted a floor plan audit, Coastal paid Ford Credit. The increase in floor plan audits occurred in 1994 after Dapremont telephoned Don Harmon and expressed interest in meeting with him regarding Coastal's floor plan. Mr. Harmon never met with Dapremont; instead, he rigorously began auditing Coastal. In 1994, Ford Credit conducted an audit every ten working days at Coastal. Prior to this time, Ford Credit rarely conducted audits at Coastal.

The more often Ford Credit audited Coastal's floor plan, the more often Coastal would have to have cash available to ensure that it could pay Ford Credit. To ensure that Coastal would have the necessary cash available, Dapremont began selling using the used cars at auctions. On some occasions, the cars were sold at a loss at the auction.

In an effort to distribute the wholesale losses over a period of time, rather that all at once, Dapremont and Sue Darby, Coastal's Secretary/Treasurer, created fictitious receivables on two occasions. Dapremont and Darby would create the fictitious receivable by creating a vehicle identification number and then pretending it was inventory. Dapremont would reduce the amount hidden whenever he could. At the time of his termination, Dapremont had paid the wholesale loss down to $80,000.00.

F. Diversified Marketing Techniques

Dapremont founded an advertising agency, DMT & Associates ("DMT"), in 1988 or 1989. Because of philosophical differences with Jeff White, the owner of the primary advertising agency used by Coastal, regarding how to reach minority buyers, Dapremont decided to place some ads for Coastal without the help of Jeff White's advertising company. Thus Dapremont began using DMT as an ad agency to order ads for Coastal in the black community in Mobile.

Dapremont would place the ad with minority newspapers and AM radio stations and, then, he would have Coastal reimburse DMT for the cost of the ads. DMT had a checking account with Compass Bank, with Dapremont having check signing authority on the account. Although the Board of Directors did not formally approve Dapremont's use of DMT, the Board knew of DMT's existence and of Dapremont's relationship to DMT.

Sometime in 1991, Dapremont hired an artist to create the advertising caricature "the Cookin' Cajun." The Cookin' Cajun was drawn in Dapremont's likeness and was dressed in a red plaid shirt and white apron, which had Coastal Ford written across it. When Dapremont began using the Cookin' Cajun in advertising, the theme increased sales almost 30%. The sales for Coastal rose to $39,000,000.00 in 1996, an all time high for Coastal Ford while Dapremont was president.

At some point in 1991, Dapremont told Jeff White that DMT was going to pay the advertising bills for Coastal. On most occasions, Dapremont prepared DMT invoices from his notes regarding what ads he had ordered. He would then submit the DMT invoices to Coastal for payment.

Ford received notice of Dapremont's use of DMT, at the latest in May of 1991 through accounting ledgers created by Ford's auditor Olan Hicks. After May of 1991, Ford received notice of Dapremont's use of DMT in at least five more occasions through various accounting ledgers and audits. Although Mr. Dorsey denies having knowledge of DMT, Mr. Dorsey admitted that he reviewed each audit, and the accompanying ledgers, performed by Olan Hicks and that there is no reason why he would not have seen the advertising expenditures.

The DMT invoices billed Coastal for the advertising ordered, Jeff White's services and Dapremont's services. Jeff White's services were typically 15% of the advertising costs.

Dapremont's services included expenses he incurred promoting Coastal, talent fees for appearing as the Cookin' Cajun, and a 15% charge for the use of his image as the Cookin' Cajun on various paraphernalia. Each month, Dapremont would calculate his 15% charge, the hours he appeared as the Cookin' Cajun and other monthly expenses. Therefore, the money paid to DMT over the amount charged for Jeff White's services was used to pay for advertising bills, Dapremont's appearances as the Cookin' Cajun, food, freezers, fireworks, aprons, toys, other giveaways and entertainment for Ford employees, Coastal employees and customers. Dapremont would entertain Ford employees, Coastal employees and customers by taking them on fishing trips, to restaurants, to bars, to strip clubs and to a hunting lodge. Dapremont also charged Coastal $3,600.00 on one occasion for Coastal's use of the Cookin' Cajun's likeness on a billboard for a year.

Dapremont worked on average 60 hours per week as president of Coastal and on average 10 to 20 hours a week as the Cookin' Cajun, depending on the time of the year. In March of 1996, Dapremont reached his sales goal related to the Cookin' Cajun advertising. Since Dapremont had reached his sales goal, he ceased his appearances as the Cookin' Cajun and stopped billing the advertising through DMT.

Ford claimed, and the lower courts concluded, that Dapremont essentially "misappropriated" $602,297.00 from Coastal for non-legitimate business expenses through his use of DMT. However, Ford's own expert testified that the entertainment of employees, Ford representatives and customers, whether at restaurants, strip clubs or hunting lodges, was a common practice among businesses.

G. Motor Vehicle Franchise Act

In April 1997, a meeting of the Board of Directors was duly called by Mr. Dorsey. The notice of the meeting advised

the participants that the topics of discussion would be: cash position, stockholders equity status, management agreement, and other business. The meeting was, however, called for the express purpose of terminating Dapremont as president and Lodd's management agreement. The notice sent to Dapremont and Lodd did not contain a statement of intention to terminate, nor a statement of the reasons for termination. The minutes expressly provide that Dapremont and/or Lodd did not receive appropriate notice of termination. The letters terminating the agreements with Lodd and Dapremont were delivered to Dapremont in violation of policies and procedures of Ford and Dealer Development.

In addition, Ford and Dealer Development failed to obtain the necessary approval for termination of a Dealer Development operator. To take termination action requires the approval of four people: Bob Rewey, the Executive Vice President of Sales and Marketing; Ross Roberts' Group Vice President; Dave Smith, Manager of Minority Dealer Development; and Phil Nome. The termination letter regarding Dapremont and Lodd failed to contain all of the signatures necessary for termination. This failure is in complete violation of the policies and procedures of Ford and demonstrates the negligent supervision and management of Ford Motor Company.

H. Miscellaneous Factual Issues

The lower courts concluded that no genuine issue of material fact existed on a number of Ford's accusations of theft by Dapremont. Ford claimed that Dapremont misappropriated money by ordering flowers from Beckham's Florist and charging them to Coastal Ford. However, Ford has absolutely no proof that the floral purchases were not charged back to Dapremont and other person's receivables.

Ford also claims that Dapremont had a number of personal services (lawn, pesticide and alarm services) paid

directly or indirectly out of dealership funds. Ford, however, had no valid evidence whatsoever that Coastal money paid for those services. Ford further claimed that repairs on Dapremont's personal hunting lodge and yacht were paid out of Coastal funds; however, Ford has failed to provide any admissible evidence on this issue also.

Finally, Ford claimed that Dapremont ordered "hot-selling" vehicles from a fictitious fleet account and sold the vehicles to other dealerships for a profit. Dapremont has testified that the fleet account number was issued by Ford to Elite Distributors ("Elite"). Elite gave Dapremont its Ford fleet number because Elite wanted to buy a number of super cab trucks and Expeditions. After receiving confirmation that Elite was a legitimate fleet buyer and that Ford Credit in Florida would floor plan everything that Elite would buy, Dapremont authorized Kevin Wade, Coastal's fleet manager, to place orders for 30 to 35 units a month under Elite's fleet account number. However, when Mr. Wade placed the order, Ford billed the entire order at once, which represented 300 new cars and trucks, instead of monthly. When the entire order was billed, Ratchford notified Dapremont that he was displeased with the manner in which the vehicles were ordered. Before the entire order was canceled, some of the vehicles ordered under Elite's fleet number arrived, and Coastal sold some of the vehicles at retail and some of the vehicles at wholesale to other dealers.

Dapremont was severely reprimanded for this incident. The monthly wholesale allocation of hot selling vehicles for Dapremont was reduced by 50% until 100% of identified allocation violations had been forfeited to Ford Division. This Draconian reprimand gave Ratchford the opportunity to further suppress the efforts of Dapremont to obtain and sell new vehicles thereby increasing Dapremont's chances of depleting cash and failure to sustain progress.

STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

> Under Fed.R.Civ.P. 56(c), a moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The substantive law applicable to the case determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "The district court should resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences in his [or her] favor." *U.S. v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc) (internal quotation marks and citations omitted).

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). The lower courts review "grants of summary judgment *de novo*, using the same legal standard as the district court." *Standard v. ABEL Services, Inc.*, No. 97-9226 (December 3, 1998) (citing *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1374 (11th Cir. 1996)). In the instant case, the lower courts applied the wrong standard of review in reaching it's decisions on Ford's Motion for Summary Judgment.

REASONS FOR GRANTING THE WRIT

I.

COASTAL AND FORD'S CLAIMS AGAINST LODD AND DAPREMONT.

A. Coastal And Ford Are Not Entitled To Summary Judgment On Their Claims Of Breach Of Contract Of The Management And Dealer Development Agreements

Dapremont's use of DMT was legitimate. Contrary to the lower courts' findings, Dapremont never admitted to "theft and mismanagement." Instead, Dapremont admitted to charging Coastal for advertising expenses he incurred in promoting the business and for expenses directly related to the furtherance of the regular business of Coastal. Dapremont paid the advertising expenses incurred by Jeff White's company out of the DMT account. Through the DMT business, Dapremont also ordered other ads, which Jeff White's company did not order. DMT also paid for services Dapremont incurred promoting Coastal with customers, Coastal employees and the Ford representatives; talent fees for appearing as the Cookin' Cajun; and a 15% charge for the use of his image as the Cookin' Cajun. Dapremont appeared, after his regular 60 hours a week of work as president of the company, as the Cookin' Cajun an average of 10 to 20 hours per week. The Cookin' Cajun also appeared in numerous ads and on various paraphernalia over the years, which accounted for Dapremont's 15% charge for the use of his likeness. Finally, all of the expenses related to Dapremont's promotion of the business with Ford representatives, his employees, and Coastal Ford customers were paid by DMT. Directly related to the furtherance of the business of Coastal, Dapremont entertained Ford employees, Coastal employees and customers by taking them on fishing

trips, to restaurants, to bars, to strip clubs and to a hunting lodge.

In the present case, both contracts (the Management Contract and the Dealer Development Contract) provide that the Operator/President may conduct activities that are "directly related to the furtherance of the regular business of the dealership." Under the plain meaning, and interpreting the terms against Ford (the drafter), Dapremont's conduct was proper and in compliance with the contracts. The undisputed evidence establishes that Dapremont's goal form 1983, as well as his continuing goal, was to buy Ford's interest in Coastal and own it outright. Because Dapremont's sole purpose at all times was to buy Ford out, it would not have served him at all to run the business into the ground. Instead, Dapremont was only served by promoting Coastal in the best manner possible in order for Coastal to have good, faithful employees, good will with its customers, and a positive relationship with Ford representatives. Based upon all of the evidence submitted to the lower courts, including Dapremont's testimony, Ford's expert testimony and the plain meaning of the contract terms, a reasonable juror could find that Dapremont's actions were in furtherance of the business and for the business' benefit. Because a reasonable juror could find that Dapremont did not breach the contracts, the lower courts erred in concluding that Dapremont breached the contracts.

Even if, assuming *arguendo*, that a reasonable juror could find that Dapremont breached the contracts by billing Coastal through DMT, genuine issues of material fact exist regarding the actual amount of damages owed to Ford. Although the trial court found that Dapremont owed Ford $602,297.00 because that was the amount that Ford alleged Dapremont took from Coastal through DMT, the evidence, viewed in the light most favorable to Dapremont does not support the finding. The undisputed evidence established that some of

the expenses charged through and paid to DMT were for Dapremont's purchase of commercials, advertising, cups, huggers, aprons, etc. Because these expenses would have been for services and items used by Coastal, they were legitimate business expenses and, therefore, not owed to Ford. Moreover, the undisputed evidence also established that some of the expenses charged through and paid to, DMT were to reimburse Dapremont for entertaining Coastal customers, employees and/or Ford representatives. All of the expenses related to entertaining would therefore have been legitimate business expenses that Ford is not owed under its breach of contract claims. Importantly, even Ford's expert admitted that common business practice is to entertain at restaurants, hunting lodges, yachts and strip clubs. A reasonable juror could therefore determine that Ford's damages under the contract claims, if any, were much less that $602,297.00. At least, therefore, a genuine issue of material fact exists on the issue of damages, which Ford bears the burden of proving.

Additionally, a genuine issue of fact exists regarding whether Ford and Coastal ratified Dapremont's conduct. Although Dapremont admits that he never made a formal request for Board approval of his use of DMT, Dapremont testified that the Board of Directors, in particular Mr. Dorsey, knew about his use of DMT and discussed DMT with numerous Ford employees. Moreover, Mr. Dorsey admitted that he reviewed each audit, and the accompanying ledgers, performed by Olan Hicks and that there is "no reason why" he would not have seen the advertising expenditures. At least six of the audits performed by Olan Hicks contained references to the use of DMT for advertising. The ratification issue applies equally to the breach of fiduciary duty claim (discussed below) made by Ford and Coastal against Dapremont and Lodd.

In light of the evidence, viewed in the light most favorable to Dapremont and Lodd, a genuine issue of material

fact exists regarding whether the Board of Directors ratified Dapremont's use of DMT. At least, a genuine issue of material fact exists regarding the amount of money expended through DMT for the furtherance of Coastal Ford's business which was not a legitimate business expense. Because genuine issues of material fact exist, the lower courts erred in granting Coastal and Ford's Motion for Summary Judgment as to their breach of contract claims.

B. Ford And Coastal Are Not Entitled To Summary Judgment On Their Breach Of Fiduciary Duty Claim

Ala. Code §§ 10-2B-8.30 and 10-2B-8.42 provide:

> (a) An director (or officer) with discretionary authority shall discharge his or her duties under that authority: (1) in good faith; (2) with care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he or she reasonably believes to be in the best interest of the corporation.

In the present action, Dapremont testified that his actions were committed in the good faith and in furtherance of the business of Coastal. The issue of whether Dapremont acted "as an ordinarily prudent person in a like position" is purely a question of fact for the jury. *Johnston v. Greene*, 121 A.2d 919, 923 (Del. 1956) (quoting *Guth v. Loft*, 5 A.2d 503, 513 (1939)). ("Whether or not the director has appropriated for himself something that in fairness should belong to the corporation is a factual question to be decided by reasonable inference from objective fact."). A reasonable juror may find that Dapremont's actions were committed in good faith and that an ordinarily prudent person in a like position would entertain and purchase advertising in the same manner as did Dapremont. Because genuine issues of material fact exist regarding whether Dapremont breached his fiduciary duty

to Coastal, Ford and Coastal's motion for summary judgment should have been denied.

As with all contract claims, at the least, an issue of fact exists regarding whether Dapremont's conduct was ratified by the Board.

II.

LODD AND DAPREMONT'S CLAIMS AGAINST COASTAL AND FORD.

A. Genuine Issues Of Fact Exist On Lodd And Dapremont's Tortious Interference With Business Relations

The trial court found that all of the individual counterclaim defendants, Ermiger, Ratchford, Dorsey, Harmon, as well as Ford Credit, were parties tot he business relation between Lodd and Ford because they were all employees of Ford. Lodd and Dapremont would note for the Court however that Ford Credit and Harmon were not agents or employees of Ford and, therefore, neither Ford Credit nor Harmon were parties to the business relationship between Lodd and Ford. (Even the trial court could not decide whether Harmon was Ford's agent or not. In its findings of fact and conclusions of law, the trial court claimed that Harmon was an agent of Ford for purposes of the tortious interference claim. With regard to the claim for negligent supervision, however, the trial court conclude that Harmon was not Ford's agent and, therefore, Ford could not supervise him.) Because Ford Credit was a separate entity from Ford, Ford Credit and Harmon were not parties to the contract between Ford and Lodd. At the very least, the issue of whether Ford Credit and Harmon are agents of Ford for purposes of Lodd and Dapremont's tortious interference claim is an issue for the jury because reasonable minds could differ regarding their agency.

Numerous events support Lodd and Dapremont's allegations that Dorsey, Ratchford, Ermiger, Harmon and Ford Credit were acting with actual malice or without justification in an attempt to harm Lodd and Dapremont by convincing Ford to terminate them despite Ford's promise to retain them as Operator and President so long as they had cash. Specifically, Dorsey adamantly refused to support Lodd's early buy out, even though Lodd had the available resources. Knowing a recession was on the rise in the economy, Dorsey maliciously suggested that Ford hold onto its interest in Coastal so that Ford could "earn back some of its expenses through the profit distribution process." With the knowledge of a recession in the future, however, Dorsey knew that profits would be less or non-existent. Therefore, by his recommendation, Dorsey ensured Ford's ability to keep its hooks in Coastal and to effectively take back all of the equity Lodd had built up over the years.

Similarly, Dorsey's constant misrepresentation to Ford regarding Coastal's cash position after the 1993 restructure agreement is another example of Dorsey's malicious conduct which was aimed at interfering with the business relationship between Lodd and Ford. Every time Dorsey misrepresented the facts regarding Coastal's cash position, Ford tried to terminate Lodd and Dapremont. Dapremont was therefore called to task and had to prove that Coastal's cash position was in fact positive in order to save his business relationship with Ford.

Despite Ford's mandate that Ford employees were to make "exceptional efforts" "to assist minority dealers to achieve and maintain adequate working capital levels", Dorsey and Ratchford's opposition to the $950,000.00 of capital needed in 1992, Ford's late payment of the legal expenses, and Dorsey's refusal to help Dapremont receive other expenses that should have been paid for through the 1993 restructure are also all indications of Dorsey and

Ratchford's tortious interference. Moreover, Dorsey's refusal to permit Dapremont to receive any more rent payments on the property leased to Coastal than the amount of the note on the property was unsupported by any business interest and done solely for malicious purposes. Dorsey did not place the same restrictions on other dealers. As a result of Dorsey's restrictions, Dapremont was forced to sell the properties at a tremendous loss.

Harmon's continuous floor plan audits in 1994, simply as a result of a phone call from Dapremont, is further evidence of tortious interference with business relations. Although Harmon and Ford Credit had rarely conducted audits at Coastal prior to 1994, Ford Credit, through Harmon, began auditing Coastal every ten working days simply because Dapremont called him and expressed interest in meeting with regarding Coastal's floor plan. Because of the frequent audits, Lodd was forced to sell its used cars at auctions in order to obtain the cash to pay Ford Credit the money it demanded after every audit. Ford Credit's audits were oppressive and without any justification.

Dorsey and Ermiger's violations regarding termination were also malicious and without any justification in interference with the business relations between Lodd and Ford. Not only was the notice of the Board meeting defective, Ermiger and Dorsey failed to obtain the proper approval of termination of Lodd and Dapremont. The termination letter was delivered to Lodd and Dapremont in direct violation of the policies and procedures of Ford and failed to contain all of the signatures necessary for termination. By not complying with Ford's policies and procedures, Ermiger and Dorsey maliciously interfered with Lodd's business relationship with Ford.

Ratchford's total control over Coastal's inventory, his interference with Coastal's ability to obtain merchandise, and his discipline of Dapremont after the fleet incident are further

examples of Ratchford's tortious interference with business relations. Despite Ford's commitment to provide exceptional efforts to assist minority dealers in obtaining appropriate levels of inventories of cars, trucks and parts, Ratchford consistently restricted Coastal's inventory and placed extreme conditions, which would only have placed Coastal in a worse financial position, on Coastal's ability to obtain merchandise. Moreover, Ratchford's discipline of Dapremont after his use of a legitimate fleet account number was draconian and further permitted Rathford to suppress Lodd's efforts to obtain and sell new vehicles. Ratchford's conduct was without justification and was extremely malicious and was, therefore, further support for the tortious interference claim.

All of the above raises genuine issues of material facts regarding whether Ermiger, Dorsey, Ford Credit and Harmon were acting outside the scope of their authority, with malice, and in an effort to serve their own interests. *Hickman v. Winston Co. Hosp. Bd.*, 508 So. 2d 237 (Ala. 1987). Furthermore, genuine issues of fact exist regarding whether Ermiger, Dorsey, Ford Credit and Harmon intentionally interfered with the contract and business relations between Ford and Dapremont and Lodd in the absence of justification.

B. Genuine Issues Of Material Fact Exist Regarding Lodd And Dapremont's Claim For Negligent And Wanton Supervision

The established law regarding negligent and wanton supervision is as follows:

> In a master and servant relationship, the master is held responsible for his servant's incompetency when notice or knowledge, either actual or presumed, of such unfitness has been brought to him. Liability depends upon its being established by affirmative proof that such incompetency was actually known by the master or that, had he exercised due and proper diligence,

> he would have learned that which would charge him in the law with such knowledge. It is incumbent on the party charging negligence to show it by proper evidence. This may be done by showing specific acts of incompetency and bringing them home to the knowledge of the master, or by showing them to be of such nature, character and frequency that the master, in the exercise of due care, must have had them brought to his notice. When such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of, it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of the servant to leave it to the jury whether they would have come to his knowledge, had exercised ordinary care.

Big B, Inc. v. Cottingham, 634 So. 2d 999, 1003 (Ala. 1993).

In the present case, the undisputed evidence establishes that Ford created specific guidelines for dealing with minority dealers in order to insure that Ford actualized its commitment to enhancing retail automotive opportunities for minorities. Despite Ford's commitment to assist minority dealers and despite its established procedures, both Dorsey and Ratchford denied ever seeing the directives regarding minority dealers. Although Dorsey and Ratchford knew of the general contents of the directives, they had never seen them in writing and no one was supervising them to ensure that the directives would be followed. Ford's failure to supervise Dorsey and Ratchford on these issues is evident by Dorsey and Ratchford's actions. As stated in the Statement of the Case, both Dorsey and Ratchford consistently interfered with Lodd's ability to maintain proper working capital and to receive adequate inventory. Moreover, Dorsey and Ratchford did not make any special efforts to aid Lodd during the recession of the

eighties; instead, they used the recession as a means to take away Lodd's interest in Coastal and to further their efforts to have Lodd terminated. Genuine issues of material fact therefore exist regarding whether Ford negligently supervised Dorsey and Ratchford regarding the proper manner to handle minority dealerships, especially in a time of recession.

Furthermore, a reasonable juror may find that Ford knew of Dorsey and Ratchford's violations of the directives regarding minority dealerships and actually exploited their behavior to its advantage. If so, Lodd and Dapremont's claim for wanton supervision would also be supported.

C. Genuine Issues Of Material Fact Exist Regarding Whether Ford Failed To Properly Account For Funds To Be Provided Under The Restructure Agreement

In April of 1993, Ford and Lodd reached a restructure agreement wherein Ford promised to pay $1,139,611.00 and to cover any expenses prior to March 1, 1993. (The restructure agreement is discussed more fully in the statement of the case above). However, instead of Ford providing $217,000.00 needed for legal expenses immediately, Ford waited almost a year to reimburse Coastal. While awaiting reimbursement from Ford, Lodd had to use the money received from Ford under the restructure agreement to cover the lawsuit costs. Because Lodd needed the entire amount for other expenses, Coastal was undercapitalized after the restructure and did not have adequate working capital. All this despite Ford's directive that "exceptional efforts" were to be made to ensure Lodd had adequate working capital. Therefore, in direct violation of its own directives, Ford withheld money from Lodd and hampered Lodd's ability to maintain proper working capital. A reasonable jury may therefore find that Ford's failure to provide the money on a timely basis was negligent.

D. Genuine Issues Of Material Fact Exist Regarding Whether Ermiger And Dorsey Breached A Fiduciary Duty To Lodd And Dapremont

In April of 1997, Mr. Dorsey called a meeting of the Board of Directors for Coastal. Although the sole purpose of the meeting was to terminate Dapremont and Lodd, the notice of the Board meeting did not include the termination issue as one of the topics of discussion. Because the notice failed to notify Dapremont and Lodd of the true purpose of the Board meeting, the notice failed to comply with the requirements of Board meeting notification. By failing to properly notify Dapremont and Lodd of the intent of the meeting and by failing to comply with the requirements of notification, a reasonable juror could find that Ermiger and Dorsey breached a fiduciary duty owed to Dapremont and Lodd.

In addition to failing to comply with basic corporate notification requirements, Ermiger and Dorsey also failed to comply with Ford's policies and procedures regarding notification of meetings and regarding termination. A reasonable juror could also find that Ermiger and Dorsey's express violation of Ford's policies and procedures was also a breach of fiduciary duty.

E. Genuine Issues Of Material Fact Exist Regarding Lodd And Dapremont's Claim For Civil Conspiracy

"A conspiracy is a combination to accomplish an unlawful end or to accomplish a lawful end by unlawful means." *Turner v. People Bank of Pell City*, 378 So. 2d 706, 708 (Ala. 1978). "Where civil liability for a conspiracy is sought to be enforced, the conspiracy itself furnishes no cause of action. The gist of the action is not the conspiracy alleged but the wrong committed." *Scott v. Common Wealth Title Insurance Co.*, 518 So. 2d 102, 104 (Ala. 1987) Finally, "the existence of the conspiracy must often be inferentially and

circumstantially derived form the character of the acts done, the relation of the parties and other facts and circumstances suggestive of concerted action." *Id.*

As established above and below, Lodd and Dapremont can establish underlying wrongful acts by the Respondents of tortious interference, negligence, wantonness, breach of fiduciary duty, breach of contract, fraud and violations of Alabama's Motor Vehicle Franchise Act. Based upon the concerted effort established throughout this petition by Dorsey, Ermiger, Harmon and Ratchford, genuine issues of material facts exist regarding whether they conspired together to harm Dapremont and Lodd.

F. Genuine Issues Of Material Fact Exist Regarding Dapremont And Lodd's Breach Of Contract Claim

In the present case, the lower courts found that Dapremont and Lodd did not have standing to pursue a breach of contract claim based upon the 1993 restructure agreement because it concluded that the restructure agreement was between Ford and Coastal. Importantly, however, Lodd was a party to the restructure agreement. In an April 8, 1993 letter from Dorsey to Lodd, Dorsey clearly stated that the agreement between Lodd and Ford was being modified based upon the restructure agreement. Specifically, the restructure agreement established that, in exchange for Ford's cash contribution and payment of expenses prior to March 1, 1993, Lodd would not receive any profit distribution. Ford cannot claim the benefit of full ownership in the dealership and then claim that it is not liable for its failure to perform under an agreement it entered with Dapremont and Lodd simply because its additional investment in the company caused Dapremont and Lodd to lose all of their equity in the company.

Under the restructure agreement, Ford promised Lodd that it would pay for various expenses that occurred before

March 1, 1993. As previously stated, Ford, however, failed to promptly reimburse Lodd $217,000.00 in legal expenses. Despite Ford's promise to pay and despite Ford's commitment to ensure that minority dealers were adequately capitalized, Ford withheld the promised monies for almost a year. A reasonable juror could find that Ford therefore breached its contract with Lodd when it failed to provide the money in a timely manner.

G. Genuine Issues Of Material Fact Regarding Dapremont And Lodd's Fraud Claim

The trial court found that Lodd and Dapremont did not have a claim for fraud based upon the restructure agreement because "Mr. Dapremont gave up nothing in connection with this restructure." Contrary to the trial court's conclusions, Lodd and Dapremont did, in fact, lose their remaining interest in Coastal. Additionally, in exchange for Ford's payment of the monies, Lodd agreed that it would not receive any bonus or profit distribution from thereon. A reasonable juror could therefore find that Lodd and Dapremont were damaged as a result of Ford's promise to adequately capitalize the dealership and subsequent failure to do so.

H. Genuine Issues Of Material Fact Exist Regarding Lodd And Dapremont's Claims Of Violations Of The Alabama's Motor Vehicle Franchise Act

The lower court's sole rationale for granting summary judgment on Lodd and Dapremont's claims under the Alabama Motor Vehicle Franchise Act was its finding that they did not have standing under the act. The Alabama Motor Vehicle Franchise Act defines a "motor vehicle dealer" as "a person operating under a dealer agreement from a manufacturer or distributor and who is regularly engaged in the buying, selling or exchanging motor vehicles in this state and who has an established place of business." Ala. Code § 8-20-3(10). Under the plain meaning of the this code

section, Lodd is an entity operating under a dealer agreement and therefore able to bring suit under this section. The Dealer Development Agreement established Lodd as the "Operator" of the dealership. Therefore, Lodd is the "person operating under the agreement". Lodd was the signing party with Ford regarding the Dealer Development agreement and Lodd was essential to the operation of the dealership, because without Lodd and Dapremont, Coastal would not have been able to operate as a minority dealership. Moreover, *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971), explicitly provides that if the parties "were so woven into" the agreement they did have standing to sue under the federal franchise act. At least, the issue of whether Lodd and Dapremont are dealers under the definition of "dealer" of the Alabama Motor Vehicle Franchise Act should be submitted to a jury.

CONCLUSION

In the present action, the lower courts conclusively held that no genuine issues of material facts existed on over ten claims by both parties. In its findings of fact and conclusions of law, the trial court improperly weighed the credibility of the witnesses and concluded that Dapremont's evidence was lacking to support a single claim against Ford or the other counterclaim defendants, or to support a single defense against Ford's accusations. The lower courts also failed to weigh the evidence in the light most favorable to the non-moving party. Because the lower courts overstepped its bounds by making such conclusions and improperly granted summary judgment in the present case on a number of issues, the Petitioners respectfully request that this Honorable Court grant their petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED NOVEMBER 15, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-6187

D.C. Docket No. 97-00640-CV-BH-C

COASTAL FORD, INC.,
FORD MOTOR COMPANY,

Plaintiffs-Counter-
Defendants-Appellees,

versus

LODD ENTERPRISES, INCORPORATED,
DELMONT O. DAPREMONT, JR.,

Defendants-Counter-
Claimants-Appellants,

Appeal from the United States District Court
for the Southern District of Alabama

(November 15, 1999)

Before DUBINA, Circuit Judge, KRAVITCH, Senior Circuit Judge, and NESBITT*. Senior District Judge.

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* Honorable Lenore C. Nesbitt, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Appendix A

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

"Costs taxed against the appellants."

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1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Appendix A

Entered: November 15, 1999
For the Court: Thomas K. Kahn,
Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JAN 13 2000

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED DECEMBER 3, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
97-0640-BH-C

COASTAL FORD, INC., et al.,

Plaintiffs,

v.

LODD ENTERPRISES, INC., et al.,

Defendants.

ORDER

This action is before the Court on, *inter alia*, motions filed by defendants Lodd Enterprises, Inc. (Lodd) and Delmont O. Dapremont, Jr. (Dapremont): to compel (Doc. 76) plaintiff's to respond to certain discovery requests and to vacate (Doc. 78) the Court's Order of October 8, 1998 (Doc. 66) to the extent it dismissed the counterclaim asserted by Lodd and Dapremont for failure to comply with prior requests for production and Orders of the Court. At the Final Pretrial Conference conducted on November 23, 1998, the Court was advised that the parties would make additional

efforts to resolve the discovery dispute at issue in the aforementioned motion to compel. It is therefore **ORDERED** that this motion (Doc. 76) be and is hereby **WITHDRAWN** from consideration and that the defendants be required to file a second motion if the dispute remains unresolved.

The Court was also advised at the Pretrial Conference that Lodd and Dapremont have produced the documents referred to in the Court's Order of October 8, 1998. It is therefore **FURTHER ORDERED** that the motion to vacate (Doc. 78) filed by Lodd and Dapremont be and is hereby **GRANTED** in that the Court's Order of October 8, 1998, is hereby **VACATED** only to the extent that the counterclaim asserted by Lodd and Dapremont was therein dismissed.

This action is also before the Court on the motion for partial summary judgment (Doc. 59) filed by the plaintiffs, Coastal Ford, Inc. (Coastal Ford) and Ford Motor Company (Ford), and by the counterclaim defendants, Ford, Coastal Ford, Ford Motor Credit Company (Ford Credit), Mike Ermiger, Don Harmon, Tom Dorsey and Mack Rachford. In conjunction with this motion for summary judgment, two motions (Docs. 60 and 68) have been filed, one by the movants, and the other by Lodd and Dapremont, seeking leave to exceed the Court's local page limitation rule. It is **ORDERED** that these motions be and are hereby **GRANTED**. Defendant and counterclaim-plaintiff Oscar E. Carter, III, (Carter) has filed no opposition to the motion.

Upon consideration of the motion for summary judgment, the briefs filed in support of and opposition thereto (Docs. 61, 67 and 73), the documentary and testimonial

evidence submitted by the parties and all other pertinent portions of the record, the Court concludes that the motion is due to be granted. The Court specifically finds and concludes as follows:

FINDINGS OF FACT

1. In 1950, Ford Motor Company (Ford) developed "the Dealer development Plan" which is designed to permit individuals with automotive experience and aptitude, but who may not have sufficient capital available to fully own an automotive dealership, the opportunity to make a small investment in a dealership with Ford investing most of the capital initially necessary. This individual or entity, known as the "operator" of the dealership, would then be given the opportunity over time to buy out Ford's investment with a share of the profits from the dealership if the dealership were profitable.

2. Beginning in the 1980's, Ford often used its available Dealer Development funds to provide opportunities for minorities to own and operate Ford dealerships. Delmont Dapremont, Jr. (Dapremont), who operated used car dealerships in New Orleans, was identified in 1983 as a candidate for a Ford Dealer Development opportunity in Mobile. According to Dapremont, because he did not have all of the $150,000 required for the initial investment, he approached three of his friends, including defendant Oscar E. Carter, III, (Carter), regarding this business deal. Eventually, Dapremont and Carter, d/b/a Lodd Enterprises, Inc. (Lodd), reached an agreement with Ford regarding Coastal Ford.

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3. Dapremont moved to Mobile in September, 1983. After Lodd, through Dapremont and Carter, invested $150,000 in Coastal Ford, Lodd became the Operator of Coastal Ford and Dapremont was appointed President in March of 1984. All involved understood that Dapremont would be the day-to-day manager of the dealership and Carter would be an investor who remained in New Orleans.

4. Dapremont managed Coastal Ford for a six-month "wholly-owned" period, during which Ford remained the 100% owner of the dealership. Dapremont and Carter executed a Dealer Development Agreement between Lodd and its shareholders and officers on the one hand and Ford on the other. This is a shareholder agreement which sets out the procedure by which the operator (Lodd) would buy Ford out over time with profits of the dealership, if the dealership were profitable. It is expressly terminable at will at any time by either party, at which time the operator would receive a payment from Ford in the amount of the operator's equity in the dealership, as then valued.

5. Under the Dealer Development Agreement, the dealership's operator owns all of the common stock, so the operator receives greater value from a profitable dealership (and the operator as manager received bonuses for profitability), but the operator also bears the initial risk of losses (after the investment), because Ford's stock is preferred.

6. The Dealer Development Agreement also provided:

> **8.02.** Operator will not, or if Operator is a partnership or corporation, it will not permit the

partner in such partnership or the stockholder in such corporation who is elected president of the Dealer to, directly or indirectly:

(a) Utilize any of the funds or assets of the Dealer for Operator's own personal benefit or for the personal benefit of any other person or legal entity or utilize such funds or assets for purposes not directly related to the furtherance of the regular business of the Dealer;

(b) Misappropriate the Dealer's funds or other assets, or permit such misappropriation by others; or

(c) Invest in any other business which, in the judgment of Ford, in any way conflicts with or is not in furtherance of the best interests of the Dealer, or which prevents the Operator from devoting his entire time and efforts to the furtherance of the business of the Dealer.

(Dapremont Deposition Exhibit 55, ¶ 8.02.).

7. Coastal Ford on the one hand, and Lodd and its shareholders and officers on the other also executed a Management Agreement, whereby Lodd (through Dapremont) was to be the day-to-day manager of the dealership, to be compensated through a specified salary from Coastal Ford for those duties. (Dapremont Dep. Ex. 56.) This agreement, like the Dealer Development Agreement, is terminable at will by either party. (*Id.*, 6.)

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8. The Management Agreement provides:

> 5. *Conflicting Interest.* Operator covenants and agrees that at all times during which Operator may be managing Dealership he will not (and in the case that Operator is a partnership or corporation, none of the partners or none of the stockholders, as the case may be, will):
>
> (i) Directly or indirectly utilize any of the funds or assets of the Dealership for his own personal benefit or for purposes not directly related to the furtherance of the regular business of Dealership. . . ; or
>
> (ii) Take or otherwise accept from Dealership, as compensation for services or otherwise, any sum whatsoever except such compensation as is provided in this Agreement or authorized by resolution of Dealership's Board of Directors.

(Dapremont Dep. Ex. 56, ¶ 5.)

9. Coastal Ford, the dealership corporation, also executed a Sales and Service Agreement with Ford. This agreement authorized Coastal Ford to use Ford's trademark, to sell and service Ford vehicles, and provided other rights and responsibilities as between the dealership corporation and the manufacturer.

10. Under the Dealer Development Agreement, Ford retained voting control of Coastal Ford until such time as

Appendix B

Lodd bought out Ford's interest from profits of the dealership (which never happened). (Dapremont Dep. Ex. 55.) Ford also appointed a majority of the board of directors. Dapremont served as a director of Coastal Ford and as its president.

11. Coastal Ford dealt with Ford's sales division through Ford's New Orleans District Sales Office. Coastal Ford received wholesale inventory financing (known as "floor plan" financing) from Ford Credit, through Ford Credit's Mobile branch. Coastal Ford's Board of Directors included Dapremont and three Ford employees assigned to Ford's Dealer Development function, two from the Dealer Development branch in Atlanta and one from Detroit.

12. The parties agree that Coastal Ford was sufficiently profitable in its first few years of operation to permit Lodd, through its share of profits, to buy out some of Ford's interest in the dealership, with the value of Lodd's equity ownership peaking after 1988. The amount of profit and ownership distribution during this time and Dapremont's alleged lack of success in obtaining approval for an early buy-out of Coastal Ford by Lodd is simply immaterial.

13. The dealership moved its location to Airport Boulevard in 1986, and Ford increased the dealership's capitalization by $400,000 at that time. The dealership had its two most profitable years of operation immediately following the move to Airport Boulevard.

14. Beginning in 1989, and for each year thereafter while Dapremont remained as general manager, Coastal Ford lost money. According to plaintiffs, the "net income (loss)" for the years 1989 through 1996 were as follows:

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1989	$(277,107)
1990	(242,630)
1991	(542,762)
1992	(141,192)
1993	(409,215)
1994	(556,832)
1995	(184,856)
1996	(90,696)
Cumulative	$(2,445,280)

(Phillips Dec., Expert Report at 6, based on audited financial statements of Coastal Ford.). According to Lodd and Dapremont, the losses sustained during this period were as follows:

1989	(403,900)
1990	(316,800)
1991	(542,800)
1992	(141,200)
1993	(763,600)
1994	(556,800)
1995	(184,900)
1996	(90,700)

Lodd/Dapremont Response in Opposition at 9-10. Thus, according to the Court's calculation, the cumulative losses alleged by Lodd and Dapremont to have occurred between 1989 and 1996 were $3,000,700, a higher figure than that proposed by the plaintiffs. In addition, Lodd and Dapremont have not disputed plaintiffs' assertion that the dealership's retained earnings during this same period was a deficit of $3,208,218.

15. On three occasions during this time period, Ford invested additional capital in Coastal Ford: $600,000 in 1990, $700,000 in 1991, and $1.139 million in 1993. In addition, Ford authorized two special parts returns to assist the dealership's cash position.

16. In 1991 or 1992, after an administrative reorganization within the Ford sales division, Coastal Ford became part of the Orlando region rather than the New Orleans district. Mack Ratchford was Ford's Orlando Regional Sales Manager and did not support recapitalization of the Coastal Ford dealership because of concerns he had about deficiencies in the dealership's business practices. Ford nevertheless made the aforementioned additional investments.

17. According to Lodd and Dapremont, Ford and Lodd reached agreement for a "capital restructuring" in April of 1993 which provided for the August 16, 1993 payment by Ford of a $1,139,611 cash contribution in exchange for which "Lodd would not receive any bonus or profit distribution until its operator's impairment was restored to par value by profits." Lodd/Dapremont Opposition Brief at 11. Dapremont has admitted that he gave up nothing in connection with this restructure. (Dapremont Dep. Vol. II 131/9-14.) Lodd and Dapremont admit that they were informed at that time that future losses might result in Ford's recommendation to terminate the Management Agreement.

18. Although Lodd and Dapremont complain about the method and timing of the additional infusion of capital by Ford, they admit that Coastal Ford continued to sustain

losses. "In early 1995, Lodd exceeded the established loss limit under the 1993 restructure agreement." Lodd/ Dapremont Opposition Brief at 12. However, according to Lodd and Dapremont, "because of progress shown through August 1995, Dealer Development 'deferred action on termination and informed Mr. Dapremont that if progress was not sustained, or cash was depleted, they would recommend terminating his management agreement'." *Id.*

19. The management agreement was in fact terminated on April 8, 1997, at a properly noticed meeting of the Board of Directors of Coastal Ford, the Board (over Mr. Dapremont's abstention) voted to terminate the at-will Management Agreement with Lodd. The Board duly notified Lodd, through Dapremont, of the meeting and of its decision. Mr. Dapremont attended the meeting with two of his attorneys and had prepared a written submission of supposed "positive improvements" at Coastal Ford. Also on April 8, 1997, Ford gave written notice to Lodd, through Dapremont, of its decision to terminate the at-will Dealer Development Agreement with Lodd.

20. Among the allegations by plaintiffs of wrongdoing by Lodd and Dapremont is the contention that the accounting employees of Coastal Ford were instructed on many occasions by Dapremont to create phony receivables which made the dealership appear to have more assets than it did. Dapremont admits that on two occasions such phony accounts receivable were created *albeit* only because "Ford Credit began increasing its floor plan audits [and] [t]he more often Ford Credit audited Coastal Ford's floor plan, the more often Coastal Ford would have to have cash available to

ensure that it could pay Coastal Ford" to ensure that Coastal Ford would not be "shut down." Lodd/Dapremont Opposition Brief at 17.

21. Plaintiffs also contend that Dapremont instructed Coastal Ford's accounting personnel to show phony or fictitious vehicles in inventory, which likewise misled Ford and Ford Credit about the assets of the dealership. According to Dapremont, Sue Darby, Coastal Ford's Secretary/ Treasurer, "would create a vehicle identification number, and then pretend it was inventory." *Id.* Dapremont thus describes the creation of fictitious vehicles as the manner by which he was able to create the fictitious receivables.

22. Plaintiffs also contend that on one occasion in 1996, Dapremont ordered hot-selling vehicles directly from Detroit, purportedly for a fleet account which turned out to be fictitious and then attempted to sell the vehicles so obtained to other dealerships for a profit. Although he denies that the fleet account he used was fictitious, Dapremont admits that the fleet account he used was not issued to Coastal Ford and that, as punishment for this conduct, "[t]he monthly wholesale allocation of hot selling vehicles for Mr. Dapremont was reduced by 50% until 100% of identified allocation violations had been forfeited to Ford Division." Lodd/Dapremont Opposition Brief at 23-24.

23. Dapremont does not dispute that he frequently entertained his sales staff, in expensive fashion using dealership funds, at the Caligula Lounge in Mobile, a topless dancing establishment. Dapremont describes this entertainment as "perks in order to attract and keep

employees." *Id.* at 20. Although Dapremont denies that he caused a number of personal services (*e.g.*, flowers for various lady friends and relatives, lawn, pesticide and alarm services at his personal residence, repairs on his personal hunting lodge and yacht, etc.) to be paid directly or indirectly out of dealership funds, he has presented no evidence to refute that proffered by the plaintiffs. *See e.g.*, Dapremont Deposition Vol. II 38-41, 75-81 and Exhibits 49, 53.

24. From the mid-1980s, the individual who was principally responsible for placing advertising for Coastal Ford in print and broadcast media was Jeffrey White. Mr. White owned part of and worked with several different advertising companies ("White's companies") over the time period 1986 through 1996.

25. Prior to 1991, White's companies placed ads for Coastal Ford, for example, in the Mobile Press Register or on Channel WKRG, and presented a monthly invoice to Coastal Ford giving a breakdown of ads purchased and the cost, with a total invoice amount for the month. As is common in the advertising industry, White's invoices to Coastal Ford included approximately a 15% override as to each listed item, which reflected the advertising company's charge for its services.

26. Beginning at least as early as 1991, Dapremont established a bank account in the name of "DMT & Associates" ("DMT"). DMT was never incorporated and has always been a sole proprietorship of Mr. Dapremont, who was the only person ever authorized to write checks or withdraw money from the DMT account.

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27. Some time in 1991, Dapremont instructed White to hand deliver each White invoice for Coastal Ford's advertising services to Dapremont. Thereafter, beginning in 1991 and continuing through early 1996, Coastal Ford no longer paid White's invoices. Instead, each month, White would hand deliver White's invoice to Coastal Ford to Dapremont. Coastal Ford, at Dapremont's direction, each month issued a check (in a much larger amount) to DMT. DMT then paid White's smaller invoice each month and the difference was kept in the DMT account owned and controlled by Dapremont.

28. Dapremont for much of this period manufactured invoices from DMT to Coastal Ford which could then be available to show to auditors or others asking to see records. Dapremont has admitted to typing the DMT invoices himself. Apparently these DMT invoices to Coastal Ford were not routinely given to Coastal Ford's accounting department early on, but later were forwarded on a monthly basis.

29. White delivered to Dapremont an invoice directed to Coastal Ford dated 3/31/1993. The invoice listed fourteen specific Mobile Press Register ads, three television commercials and one radio spot, showing specific amounts charged for each, and also showed 14 specific "production" items (such as aprons, posters, a tent, and the like), for a total invoice amount of $25,529.05. The DMT invoice to Coastal Ford typed by Dapremont himself for the same period bears an address and phone number that were actually the address and phone number of White's advertising company at the time. The DMT invoice bears the same invoice number as the Coastal Ford invoice. The DMT invoice reflects an

account representative named "Jeff." Jeff White never worked for DMT, but instead was always an employee or officer of White's companies. The DMT invoice then includes precisely the same line items as the White invoice to Coastal Ford, except that as typed by Dapremont, the DMT invoice includes a significantly higher price for many of the items. *Cf.*, Dapremont Deposition. Exs. 27 and 28. The result was an invoice to Coastal Ford from DMT in the amount of $39,528.60.

30. Coastal Ford issued a check at Dapremont's instruction to DMT in the amount of $39,528.60 on April 14, 1993. White was then paid $25,529.05 and Dapremont, through DMT, pocketed the difference — $14,000 for that one month alone.[1] In none of the numerous invoices created by Dapremont for DMT and issued to Coastal Ford did

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1. Dozens of other monthly invoices from White and the commensurate marked-up invoices from Dapremont/DMT reflect Dapremont's scheme just as clearly. For additional examples, compare:

- White Dep. Ex. 15 (June 30, 1995 White invoice for $30,331.55) and Ex. 17 (June 27, 1995 DMT invoice for $39,959.52);

- Dapremont Dep. Ex. 31 (March 28, 1994 White invoice for $30,115.53) to Ex. 32 (check from Coastal Ford to DMT & Associates for $45,115.53 (no invoice produced for this month)); and

- Dapremont Dep. Ex. 36 (September 30, 1995 White invoice for $19,743.25) to Ex. 37 (September 30, 1995 DMT invoice for $32,046.46).

Dapremont reveal that charges were being made for the "Cookin' Cajun," for an "appearance charge," for a "talent fee" or otherwise.

31. The total which Dapremont caused Coastal Ford to pay to DMT, over and above what DMT paid to White's companies for actual advertising, was $602,297, a 41% mark-up. Dapremont neither disputes the fact that the $602,297 was taken or the fact that Coastal Ford's Board of Directors never approved the DMT advertising scheme. Dapremont merely rationalizes that his use of DMT resulted from philosophical differences with Jeff White regarding how to reach minority buyers, that his charges were reasonable compensation to him for services rendered to the dealership as the "Cookin' Cajun" and that, despite contractual requirements to the contrary, the Board's alleged knowledge of DMT's existence and Dapremont's relationship with DMT[2] somehow absolves him of any violations of his contractual and fiduciary duty not to engage in any self-dealing with Coastal Ford.

32. Dapremont does not deny that the money he obtained through DMT went to his own personal use, including to pay his home mortgage, to pay the mortgage on his yacht, and to pay for his many visits to the Caligula club, restaurants, and fishing trips.[3]

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2. Dapremont neither identifies nor presents any evidence to support the contention that the Board knew about DMT and Dapremont's relationship with DMT.

3. Dapremont exercised his Fifth Amendment rights during his deposition when asked about money he personally received from DMT and his failure to report same on his income tax returns.

33. The payments from Coastal Ford to DMT stopped in 1996. Thereafter White was paid directly by Coastal Ford.

34. As stated above, on April 8, 1997, the Board of Directors of Coastal Ford voted over Dapremont's abstention to terminate the at-will Management Agreement with Lodd. On that same day, Ford gave written notice to Lodd, through Dapremont, of its decision to terminate the at-will Dealer Development Agreement with Lodd.

35. The dealership's independent auditors thereafter determined that the retained earnings of the dealership were a deficit amount of $4,015,416. Pursuant to the formula set out in the Dealer Development agreement, Ford then tendered to Lodd $1, reflecting the fact that Lodd's equity in Coastal Ford at that point had no value. Dapremont and Lodd do not dispute that Lodd's equity had ceased to have any value long before 1996.

36. Carter has filed no opposition to plaintiffs' motion for summary judgment and contentions that he was knowledgeable about Dapremont's and Lodd's activities but failed to inform Coastal Ford's Board of Directors.

CONCLUSIONS OF LAW

A. PLAINTIFFS' CLAIMS

1. Dapremont's taking of $602,297 from Coastal Ford through DMT without the approval of Coastal Ford's Board of Directors was a breach of the Dealer Development Agreement and the Management Agreement. Because

Dapremont has not disputed that a resolution was never sought or obtained from the Board to support the DMT advertising scheme, Ford is entitled to summary judgment on this claim. *See Rail Europe, Inc. v. Rail Pass Express, Inc.*, 1996 WL 157503 at *5 (S.D.N.Y. 1996).

2. Damages for a breach of contract are the amount of the loss suffered by a party harmed by the breach. *Hobson v. American Cast Iron Pipe Co.*, 690 So.2d 341, 344 (Ala. 1997) ("It is a well-settled principle of law that damages for a breach of contract are the amount of the loss suffered by the party harmed by the breach."). Coastal Ford is thus entitled to recover damages for Dapremont's breach of contract in the amount of $602,297.

3. Dapremont as a director and as president of Coastal Ford owed to Coastal Ford a fiduciary duty. Ala. Code 1975 §§ 10-2B-8.30 and 10-2B-8.42 (duties of officers and directors). *See also, Distronics, Ltd. v. Disc. Mfg., Inc.*, 686 So.2d 1154, 1160 (Ala. 1996). Carter likewise owed a fiduciary duty to Coastal Ford as an officer of the dealership.

4. Dapremont's admittedly unauthorized conduct of taking funds from the dealership through DMT was a breach of his fiduciary duty to Coastal Ford. *Wood v. Mangum*, 645 F. Supp. 131, 134 (E.D. Ark. 1986) (holding that corporate officer's conduct in assisting in the organization of a competitor to corporation and serving as a consultant to that competitor constituted a breach of fiduciary duty). *See also, Tinwood v. Sun Banks, Inc.*, 570 So.2d 955, 959 (Fla. Dist. Ct. App. 1990) ("In the absence of a showing that he acted with the consent of the shareholders, an officer or director is

precluded from making any secret profit or deriving any personal advantage at the expense of the corporation"). Carter's undisputed knowledge of Dapremont's activities and his failure to inform the board of directors likewise constitutes a breach of fiduciary duty. *Id.*

5. Coastal Ford is entitled to the entry of summary judgment on its breach of fiduciary duty claim and is entitled to damages in the amount of $602,297 taken from Coastal Ford by Dapremont.

6. To the extent Dapremont contends that the Board of Directors of Coastal Ford somehow ratified the DMT advertising scheme, a contention unsupported by the evidence of record, he fails to cite a single case where a board of directors has been held to have ratified self-dealing by a corporate officer (where the officer falsified the records that would have revealed the self-dealing) based on an unsupported allegation of knowledge by an employee of a stockholder who was not on the board. On the contrary, ratification "is effective only when the corporate officer has fully disclosed all of the material facts of the transactions to the board of directors or shareholders." *General Dynamics v. Torres*, 915 S.W.2d 45, 50 (Tex. App. 1995); *accord Harris Trust & Savings Bank v. Joanna-Western Mills Co.*, 368 N.E.2d 629, 635 (Ill. App. 1977) ("Knowledge of the allegedly unauthorized agreement is a requisite before any ratification by silence may be inferred."); *see also Bence v. Alabama Coal Cooperative*, 681 So.2d 130, 134 (Ala. 1996) (holding that the "element of knowledge is vital to [the officer]'s argument of ratification" and granting summary judgment for the corporation). "[R]atification is not available

to condone a corporate officer or director's disloyalty or fraud." *General Dynamics*, 915 S.W.2d at 50.

B. DEFENDANTS' COUNTERCLAIM

1. The elements of the tort of intentional interference with business relations are:

> (1) the existence of a contract or business relation;
>
> (2) the defendant's knowledge of the contract or business relation;
>
> (3) intentional interference by the defendant with the contract of business relation;
>
> (4) the absence of justification for the defendant's interference; and
>
> (5) damage to the plaintiff as a result of the interference."

Soap Co. v. Ecolab, Inc., 646 So.2d 1366, 1371 (Ala. 1994), *citing, Gross v. Lauder Realty Better Homes & Gardens*, 494 So.2d. 590, 597 (Ala. 1986). *See also, Bosarge v. Bankers Life Co.*, 541 So.2d 499 (Ala. 1989) (affirming summary judgment where plaintiffs failed to show "substantial evidence" of interference).

2. It goes without saying that a party to a "business relation" cannot be held liable for interference with that

relation. *Williams v. A.L. Williams & Assoc.*, 555 So.2d 121, 124 (Ala. 1989). It is also well established that a principal's agent or employee is a party to that principal's contractual and business relations. *Harold v. Reynolds Metal Co.*, 495 So.2d 1381, 1388 (Ala. 1986).

3. As applied to the case at bar, each of the named Counterclaim Defendants was a party to the business relationship at issue or was an individual employee of those parties and acted only in his capacity as an employee. The "status as [parties] to the business relationships involved here cannot be questioned." *Williams*, 555 So.2d at 124. Because the Counterclaim Defendants were parties to the relationship at issue, summary judgment is proper on the interference counterclaim.

4. In addition, there has been no evidence proffered to establish that any of the Counterclaim Defendants engaged in interference with any business relation or that any claimed damages flowed from the alleged interference. *Soap Co.*, 646 So.2d at 1371. While conclusively asserting that fact questions exist on this issue, Lodd and Dapremont submit no evidence that any employee of Ford or Ford Credit acted maliciously or outside the scope of their employment. In fact, Dapremont confirmed in his deposition that the individual defendants named in the counterclaims were Ford or Ford Credit employees and were acting as Ford or Ford Credit employees in everything they did with regard to Coastal Ford. (Dapremont Vol. II 162/21-167/9.)

5. There has likewise been no evidence presented to establish that Counterclaim Defendants Ermiger, Dorsey,

Harmon or Darby did anything actionable to Dapremont, Carter or Lodd, so there can be no claim against Ford for negligent failure to supervise them. There can be no claim for negligence without breach of a legal duty and, under the undisputed facts of this case, Ford owed no duty to supervise Ford Credit, Harmon or Darby. *Perkins v. Dean*, 570 So. 2d 1217, 1220 (Ala. 1990) (affirming summary judgment in favor of defendant on negligent supervision claim, because "the undisputed facts establish that there was no duty owed by [defendant] to [plaintiff]"); *Wilson v. Direct Cable Technologies, Inc.*, 964 F. Supp. 1548, 1555-56 (M.D. Ala. 1997) (granting summary judgment to defendant on negligent supervision claim, on grounds that defendant owed plaintiff no duty to supervise someone else's employees).

6. The counterclaim for "[n]egligent failure to properly site the new location of the dealership and/or monitor proper allocation of market area responsibility" is barred by the statute of limitations, as the relocation of the dealership that is the subject of this allegation occurred in 1986. *See e.g., Henson v. Celtic Life Ins. Co.*, 621 So.2d 1268, 1273-74 (Ala. 1993); Ala. Code 1975 § 6-2-38 (two-year statute of limitations for negligence and wantonness). In any event, because the dealership had its two most profitable years immediately following the dealership's relocation, this claim fails as a matter of law. There is no evidence that Ford was negligent in its siting of the dealership and neither Lodd nor Dapremont can show any harm attributable to the relocation in any event.

7. The counterclaim for "[n]egligent failure to properly account for funds to be provided to Coastal Ford and/or to

Dapremont, Carter and Lodd under the minority Dealer Development program and/or under the restructure agreement" likewise states no claim. There is no evidence that any Counterclaim Defendant was negligent in failing to account for such funds and no evidence of any harm to Lodd or Dapremont attributable to any such failure to account.

8. Counterclaim Defendants are also entitled to summary judgment on the counterclaim for "[n]egligent failure to provide inventory to Coastal Ford and/or to Dapremont, Carter and Lodd pursuant to contractual agreements existing between Ford, Coastal Ford, and Lodd, Dapremont and Carter." Ford had no duty to provide inventory to Dapremont, Carter, or Lodd. The recipient of any inventory under the agreements was Coastal Ford, a plaintiff here; not Dapremont, Lodd, or Carter. In addition, there has been no evidence presented to establish that Coastal Ford received anything less than its fair share of any inventory.

9. For there to be wanton conduct under Alabama law, the defendant must with reckless indifference of the consequences consciously and intentionally do some wrongful act or omit some duty which produces an injury, and such elements of wantonness cannot be left to conjecture. *Martin v. Arnold*, 643 So.2d 564, 567 (Ala. 1994). Summary judgment is proper on the wantonness counterclaim. There is no admissible evidence to support the proposition that Ford or any of the other Counterclaim Defendants failed in some duty to Dapremont or Lodd, nor is there any evidence that Ford or any other Counterclaim Defendant did so with intent or with "reckless indifference of the consequences."

10. Dapremont and Lodd allege that Ford has been unjustly enriched in terminating the "minority dealer development agreement" and other contractual agreements "in that [Ford] has taken advantage of a dealership with rising profitability." (Counterclaim, ¶ 115). There is no evidence that Coastal Ford, which lost over $2.4 million between 1989 and 1996, was a dealership with "rising profitability." Similarly, there is no evidence of any conduct by Ford in "taking advantage" of Coastal Ford that would support a claim for unjust enrichment.

11. It is also well established that a plaintiff cannot pursue a quasi-contract claim such as unjust enrichment when there is an express contract between the parties. *Distronics Ltd. v. Disc Mfg., Inc.*, 686 So.2d 1154, 1164 (Ala. 1996), *overruled on other grounds by Professional Ins. Co. v. Sutherland*, 700 So.2d 347 (Ala. 1997); *accord Novacare, Inc. v. Southern Health Mgt., Inc.*, 1998 WL 470142 (E.D. Pa. Aug. 11, 1998) ("when . . . the parties' relationship is based on an express written contract no unjust enrichment recovery is permitted"). Here, the various business relationships between the parties were governed by express agreements, all of which were expressly terminable at will. The unjust enrichment counterclaim therefore fails as a matter of law and the Counterclaim Defendants are entitled to summary judgment on same.

12. Ford was simply a shareholder in Coastal Ford and owed no fiduciary duty to Dapremont or Carter personally. A majority shareholder may owe a fiduciary duty to other shareholders in certain circumstances. *See e.g., Burt v. Burt Boiler Works, Inc.*, 360 So.2d 327, 331 (Ala. 1978).

However, there is no evidence in the case at bar to support imposing such a duty to Ford in this case. Moreover, there is no evidence of any conduct by Ford that would constitute a breach of such a duty.

13. The sole allegation against Ford is that Ford "apparently convened one or more unnoticed stockholders' meetings prior to April 8, 1997 for the purpose of considering the termination of Dapremont . . . ." (Counterclaim, ¶ 118.) Dapremont and Lodd have failed to present sufficient evidence that any such meetings took place and have not articulated how such a meeting would be a breach of duty in any case. Summary judgment is proper on this claim.

14. Subsection (b) of Count V of the Counterclaim seeks to state a claim against Ermiger and Dorsey in their capacities as Directors of Coastal Ford but alleges only that they conducted unauthorized stockholders' meetings and arranged an unauthorized and improperly noticed Board meeting for the purpose of terminating the contracts. (Counterclaim ¶ 118(c).) Again, Lodd and Dapremont have presented no evidence that such meetings occurred.

15. In addition, any claim against Ermiger and Dorsey in their capacity as directors of Coastal Ford would have to be asserted only as a derivative claim on behalf of Coastal Ford, not a direct claim by Lodd, Dapremont, or Carter. *Galbreath v. Scott*, 433 So.2d 454, 457 (Ala. 1983) (rejecting claim by minority stockholder for injury to the corporation and holding that such injury gives rise only to a derivative claim). Dorsey or Ermiger owed no fiduciary duty to Dapremont or Carter personally. (Dapremont Dep. Vol. III

146/9-14.) Consequently, this allegation fails to state a claim upon which relief can be granted.

16. It is also undisputed that the meeting of the Board of Directors at which Lodd's at-will Management Agreement was terminated was properly noticed and the termination was proper. Summary judgment is due to be granted on the breach of fiduciary duty claim.

17. "A civil conspiracy requires a combination of two or more individuals to accomplish a lawful end by unlawful means." *Triple J Cattle, Inc. v. Chambers*, 621 So. 2d 1221, 1225 (Ala. 1993) (citation omitted). Conspiracy itself, however, furnishes no civil cause of action. *Id.* Thus, "a conspiracy claim must fail if the underlying act itself would not support an action." *Id.* (affirming directed verdict on conspiracy claim).

18. There has been no evidence presented of any underlying wrongful act that would support a conspiracy claim. Moreover, there is no evidence of record which establishes that these individuals and entities had as their objective purpose the causing of damage to Lodd and Dapremont. In the absence of such evidence, Counterclaim Defendants are entitled to summary judgment on the conspiracy counterclaim.

19. Ford is also alleged to have breached the "restructure agreement" between Ford on the one hand and Dapremont and Lodd on the other by failing to provide promised capital to the dealership. Dapremont and Lodd lack standing to pursue a claim for failure to provide capital to Coastal Ford

as the funds to be provided under the recapitalization were due to be paid *to the dealership*, Coastal Ford and not to Dapremont or Lodd. *See e.g., Cottingham v. General Motors Corp.*, 119 F.3d 373 (5th Cir. 1997) (individual owner and operator of dealership corporation lacked standing to sue for manufacturer's alleged breach of dealership agreement); *Pearson v. Ford Motor Co.*, 68 F.3d 1301 (11th Cir. 1995) (general manager of dealership lacked standing to sue for alleged injuries to dealership corporation because corporation, and not the general manager, was the dealer); *Carney v. General Motors Corp.*, 23 F.3d 1154, 1157 (7th Cir. 1994) (operator of dealership had no standing to sue GM for alleged breach of dealership agreement, because operator was not a party to that agreement).

20. In addition, there is no evidence to support the "failure to provide promised capital" claim. It is undisputed that the $1.139 million Ford agreed to pay to recapitalize Coastal Ford in 1993 was paid to the dealership. Moreover, the 1993 restructuring was made completely at Ford's option. Dapremont admitted that he gave up nothing in return for the restructure. Summary judgment is due to be granted on this claim.

21. Ford is also alleged to have breached the Dealer Development Agreement when it valued Dapremont's (Lodd's) common stock at $1.00. However, Dapremont's own expert has now submitted a report that concludes: "Based on the financial records of Coastal Ford, Inc. as presented at April 30, 1997, the value of $1 paid to the defendants *was appropriate* based on the definitions of the Dealer Development Agreement." (Expert Witness Report

of Jeff F. Allen, CPA, CFE.) Thus, it is undisputed that the stock valuation was proper, and this claim is therefore subject to summary judgment.

22. Lodd and Dapremont have also alleged fraud relative to the recapitalization or "restructure" Ford agreed to in April, 1993. The elements of a misrepresentation claim are: (1) a misrepresentation of a material fact; (2) made wilfully to deceive or recklessly without knowledge; (3) which was justifiably relied on by the plaintiff under the circumstances, and (4) which caused damage as a proximate consequence. *Harrington v. Johnson-Rast & Hays Co.*, 577 So.2d 437, 439 (Ala. 1991).

23. It is undisputed that Dapremont gave up nothing in connection with this restructure. Thus, there is not only no evidence of any false statements having been made but no evidence either of any detrimental reliance by Dapremont or Lodd on any false statements or any resulting injury. The entire amount planned for the restructure was paid to Coastal Ford. Summary judgment is proper on the fraud counterclaim.

24. The counterclaim for alleged violations of various provisions of the Alabama Motor Vehicle Franchise Act also fail as a matter of law. Dapremont, Carter and Lodd do not have standing under the Act. Only Coastal Ford would have standing to pursue a claim for injury to the dealership. *Cottingham v. General Motors Corp.*, 119 F.3d 373 (5th Cir. 1997); *see also Pearson v. Ford Motor Co.*, 68 F.3d 1301 (11th Cir. 1995) (general manager of dealership lacked standing to sue under federal Automobile Dealer Day in

Court Act for alleged injuries to dealership corporation because corporation, and not the general manager, was the dealer); *Fields v. General Motors Corp.*, 121 F.3d 271, 277 (7th Cir. 1997) (holding that shareholders in a dealership corporation cannot bring a claim for alleged harm to the dealership corporation); *Carney v. General Motors Corp.*, 23 F.3d 1154, 1157 (7th Cir. 1994) (operator of dealership had no standing to sue GM for alleged breach of dealership agreement, because operator was not a party to that agreement); *Kagan v. Edison Bros. Stores, Inc.*, 907 F.2d 690, 693 (7th Cir. 1990) ("[Plaintiffs attempting to sue as individuals for harm to their corporation] seek the best of both worlds: limited liability for debts incurred in the corporate name, and direct compensation for its losses. That cushy position is not one the law affords. Investors who created the corporate form cannot rend the veil they wove.").

25. The only counterclaim defendant (among 12 listed) against whom an action under the Alabama Motor Vehicle Franchise Act could possibly be brought is Ford. Thus, the other Counterclaim Defendants named in this count are without question entitled to summary judgment. In any event, there is no admissible evidence to support a claim that Ford violated any provision of the Act even as to Coastal Ford, much less as to Dapremont, Carter or Lodd. Counterclaim Defendants therefore are entitled to summary judgment as to Count 10 of the counterclaim.

CONCLUSION AND ORDER

For the reasons stated above, the Court concludes that there exists no genuine issue of material fact and that the

Appendix B

Counterclaim Defendants are entitled to judgment as a matter of law. Accordingly, the Court concludes and it is therefore **ORDERED** that the motion for partial summary judgment (Doc. 59) filed by the plaintiffs, Coastal Ford, Inc. and Ford Motor Company, and by the counterclaim defendants, Ford, Coastal, Ford Motor Credit Company (Ford Credit), Mike Ermiger, Don Harmon, Tom Dorsey and Mack Rachford, is due to be and is hereby **GRANTED** in that, at the conclusion of this case, judgment is due to be entered: (1) in favor of the plaintiffs, Coastal Ford, Inc. and Ford Motor Company, and against the defendants, Lodd Enterprises, Inc., Delmont O. Dapremont, Jr. and Oscar E. Carter, III, jointly and severally, in the amount of $602,297, said judgment to bear interest at the legal rate from the date of such judgment; and (2) in favor of the counterclaim defendants, Ford Motor Company, Coastal Ford, Inc., Ford Motor Credit Company (Ford Credit), Mike Ermiger, Don Harmon, Tom Dorsey and Mack Rachford, and against the counterclaim plaintiffs, Lodd Enterprises, Inc., Delmont O. Dapremont Jr. and Oscar E. Carter, III, the counterclaim plaintiffs to have and recover nothing of the counterclaim defendants. Costs shall as well be taxed at the conclusion of this litigation.

DONE this 3rd day of December, 1998.

s/ [illegible]
SENIOR DISTRICT JUDGE

APPENDIX C — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 3, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-6187

COASTAL FORD, INC.,
FORD MOTOR COMPANY,

Plaintiffs-Counter-
Defendants-Appellees,

versus

LODD ENTERPRISES, INC.,
DELMONT O. DAPREMONT, JR.,

Defendants-Counter-
Claimants-Appellants.

On Appeal from the United States District Court for the Southern District of Alabama

BEFORE: DUBINA, Circuit Judge, KRAVITCH, Senior Circuit Judge, and NESBITT*, Senior District Judge.

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* Honorable Lenore C. Nesbitt, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Appendix C

PER CURIAM:

The petition(s) for rehearing filed by Appellants' is DENIED.

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE